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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARSHALL L. KADNER,

Plaintiff and Appellant,

v.

RUTH F. COUSINEAU, et al.,

Defendants and Respondents.

B205942

(Los Angeles County  
Super. Ct. No. BS112241)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Hillel Chodos for Plaintiff and Appellant.

Freedman & Taitelman, Michael A. Taitelman and Jacqueline C. Brown, for  
Defendants and Respondents.

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## INTRODUCTION

Appellant Marshall L. Kadner, M.D., appeals from a judgment confirming an arbitration award in favor of respondents Ruth F. Cousineau, M.D., and Robert F. Katz, M.D. Appellant contends the judgment must be reversed, in that the arbitrator exceeded his powers and the judgment cannot be corrected without affecting the merits of the arbitration award. He also contends the trial court abused its discretion in denying his request for an evidentiary hearing. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### ***A. The Arbitration Award***

As set forth in the arbitration award, the factual background of this case is as follows: The parties are physicians, specializing in obstetrics and gynecology. They had their own practices, but in 1995 they formed a partnership. Although they had no written partnership agreement, they agreed they would split the profits from their practice evenly.

In 1998, respondents began discussing a new partnership agreement based upon their belief that they were more productive than appellant. The parties executed a memorandum of understanding in 2000 to address these concerns.

Problems continued, and on March 31, 2003, appellant left the partnership, although he continued his practice in the offices shared with respondents. Respondents decided to dissolve the partnership on June 9, 2003.

The parties entered into an agreement that all disputes between appellant and respondents “concerning their partnership, the dissolution of that partnership and the management, control and distribution of the assets and liabilities of the partnership until completion of the dissolution will be resolved by binding arbitration” before retired Judge Robert M. Letteau.

The arbitrator viewed the scope of the arbitration involved two issues: (1) whether respondents “in their capacities as the Partnership’s duly designated ‘winding up

partners' have rendered a full, fair and accurate accounting of the affairs of this medical practice"; and (2) if not, what was owed by respondents to appellant. The arbitrator specified that "[t]he scope of this arbitration did not involve consideration of David Herman's Fees for accountancy services, which this Arbitrator believes should be the subject of a cost bill (i.e., Memorandum of Costs) presented by [respondents] and subject to challenge by [appellant]."

"Following numerous hearings and much contention during more than four years of litigation," the case was submitted to the arbitrator on August 8, 2007. His decision was issued on September 29, 2007.

The arbitrator found it "abundantly clear" that appellant "was credited properly with his share of the enterprise's earnings and was debited for no more than his proportionate share." The arbitrator also ruled that of the costs sought by respondents in their memorandum of costs, "only the sum of \$37,959.04 for David Herman's fees" was awarded to respondents.

#### ***B. The Petition to Vacate the Arbitration Award***

On November 30, 2007, appellant filed a petition to vacate the arbitration award "because the arbitrator exceeded his powers in various respects, including among others his determination to include in the Award witness fees and other expenses incurred by respondents for their own benefit, notwithstanding the provisions of [Code of Civil Procedure section] 1284.2, and notwithstanding that the parties' Arbitration Agreement contains no provision authorizing the award or reallocation of costs or expenses."

Respondents filed a memorandum of points and authorities in opposition to the petition. They opposed the petition on the grounds it was both procedurally and substantively defective. These defects included the failure to include supporting declarations or points and authorities. In response, on January 8, 2008, appellant filed a request for an evidentiary hearing.

The trial court denied both the petition and the request for an evidentiary hearing. It confirmed the arbitration award.

## DISCUSSION

### ***A. Whether the Judgment Must be Reversed and the Arbitration Award Vacated on the Ground the Arbitrator Exceeded his Powers***

Appellant contends that the arbitrator exceeded his powers in including in the award witness fees and other expenses incurred by respondents for their own benefit when the arbitration agreement did not authorize an award of costs and expenses. We disagree.

The Legislature through the provisions of the Code of Civil Procedure has established a “strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) For this reason, the courts indulge every intendment in favor of an arbitration award. (*Ibid.*) Under Code of Civil Procedure section 1286.2, there are only limited grounds upon which an arbitration award may be vacated. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1365.) A party seeking vacation of an arbitration award must show that one of the grounds set forth in Code of Civil Procedure section 1286.2 exists and must show substantial prejudice. (*United Brotherhood of Carpenters etc., Local 642 v. DeMello* (1972) 22 Cal.App.3d 838, 840.) We review the trial court’s ruling de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9.)

One of the grounds for vacating an arbitration award is that “[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” (Code Civ. Proc., §1286.2, subd. (4).) An arbitrator exceeds the scope of his powers by acting without subject matter jurisdiction, deciding an issue not submitted to arbitration, arbitrarily remaking a contract, upholding an illegal contract, issuing an award that violates public policy, fashioning a remedy not rationally related to the contract, or selecting a remedy not authorized by law. (*O’Flaherty v. Belgium* (2004) 115 Cal.App.4th 1044, 1055-1056.) We give substantial deference to the arbitrator’s determination as to the scope of his or her powers.

(*Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 372; *O’Flaherty*, *supra*, at p. 1056.)

However, an arbitrator does not exceed his or her powers “merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted.” (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.) Similarly, “unless expressly restricted by the agreement of the parties,” an arbitrator has “the authority to fashion relief [he or she] consider[s] just and fair under the circumstances existing at the time of the arbitration, so long as the remedy may be rationally derived from the contract.” (*Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 383.) We will uphold the award “so long as it was even arguably based on the contract.” (*Id.* at p. 381.)

Appellant contends the arbitrator exceeded his powers by making an award which violated Code of Civil Procedure section 1284.2. This section provides: “Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his [or her] pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.”

It is clear from the papers submitted to the arbitrator that included in the fees Herman charged for his services were fees incurred in connection with the winding up of the partnership. They were not “witness fees” or “other expenses of the arbitration.” That the arbitrator identified them as “costs” does not mean that they were costs within the meaning of Code of Civil Procedure section 1284.2. An error of law in identifying the fees as costs rather than as part of the award on the merits of the case is not grounds for vacating the arbitration award as long as the issue was within the scope of the controversy submitted to arbitration. (*Moshonov v. Walsh*, *supra*, 22 Cal.4th at p. 775.)

As discussed above, the parties agreed to arbitrate all disputes between them concerning the dissolution of the partnership and the distribution of the partnership’s assets and liabilities. The arbitrator placed respondents in charge of winding up the

partnership and accounting to appellant for the partnership assets and liabilities. Dividing between appellant and respondents the accounting expenses incurred by respondents during this process is a remedy rationally related to the arbitration agreement. Ordering appellant to pay his share of these fees thus did not exceed the arbitrator's powers. (*Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 383; *O'Flaherty v. Belgium*, *supra*, 115 Cal.App.4th at pp. 1055-1056.)

***B. Whether the Trial Court Abused its Discretion in Denying Appellant's Request for an Evidentiary Hearing***

As stated above, one basis of respondents' opposition to the petition to vacate the arbitration award was that it was procedurally defective due to appellant's failure to include supporting declarations or points and authorities. In response, appellant requested an evidentiary hearing. The trial court denied his request.

As appellant acknowledges, a petition to vacate an arbitration award ordinarily is decided on the basis of affidavits or declarations and documentary evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Holding an evidentiary hearing and taking oral testimony are matters left to the discretion of the trial court. (*Id.* at p. 414.)

Even where there are conflicts in the evidence, an evidentiary hearing is not mandated. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 414.) Only where there are sharply conflicting versions of the facts and credibility is at issue may it be an abuse of discretion to deny an evidentiary hearing. (*Ibid.*)

Appellant claims that "[t]o the extent the moving and reply papers left any doubt about whether and to what extent Herman's fees were included in the accounting (or indeed, as to whether he worked for [respondents, as opposed to the partnership]), a full evidentiary hearing was especially necessary in this case." We disagree.

If the trial court had any doubt regarding Herman's fees, it could have requested additional documentation. That it did not suggests that it had no doubt about the matter. Appellant points to nothing in the record suggesting that an evidentiary hearing was

necessary to resolve credibility questions. Accordingly, we find no abuse of discretion in the denial of his request. (Cf. *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1160-1161.)

### **DISPOSITION**

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.